AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–900 OF 2008
ABDULL HAMID EMBONG FCJ, ABDUL MALIK ISHAK AND KANG HWEE GEE JJCA
22 OCTOBER 2009

Civil Procedure — Limitation — Defendant raising defence of time bar against plaintiff's claim — High Court judge struck out appellant's claims founded in contract and in tort on preliminary issue of limitation — Appeal against decision — Whether trial judge erred when he found that cause of action had been brought after expiration of six years from date on which cause of action in contract or on tort accrued — Limitation Act 1953 s 6(1)

Civil Procedure — Pleadings — Parties bound by — Whether appellant could rely on s 29 of the Limitation Act 1953 to postpone limitation period

The appellant bank had granted a loan facility for the loan sum of RM800,000 to MYT Builders Sdn Bhd ('the borrower'). The loan was secured by a third party assignment over a piece of land known as Lot 465 in Perak (Lot 465). Lot 465 was one of the sub-divisional portions of another piece of land held under Lot No 57436 and registered in the name of Majlis Bandaraya Ipoh ('MBI'). By way of a power of attorney, MBI had authorised a developer to enter into contracts of sale in respect of the land held under Lot No 57436 and the developer had entered into a sale and purchase agreement with the assignor to sell Lot 465 only. The respondents, who were at all material times lawyers practising with a law firm known as Messrs Aziz Hassan & Co, were instructed by the respondents to prepare and attend to the execution of the loan agreement by the borrower, dated 6 April 1999, and the execution of the third party assignment of the land by the assignor, which was also dated 6 April 1999. The appellant thereafter released the loan sum of RM800,000 to the borrower. Sometime in November 2000, the borrower defaulted on the repayment of the loan to the appellant. The appellant then sought to enforce the third party assignment over Lot 465 by way of a private auction, and for that purpose sought the consent of MBI for the sale. When MBI refused to agree, the appellant commenced an action against MBI to compel the latter to consent to the sale of Lot 465. Thereafter the appellant decided to withdraw the proceedings against MBI because it was of the view that it did not have a good title to Lot 465. The appellant then commenced an action against the respondents on the grounds that the respondents had acted in breach of contract or were negligent in failing to advise the appellant

A that the assignor did not have good title to Lot 465. The High Court judge struck out the appellant's claims founded in contract and in tort on a preliminary issue of limitation. The trial judge held that the appellant's claim was time barred under s 6 of the Limitation Act 1953 ('the Act'), in that, the limitation period for contract and tort ran from the date the alleged cause of
B action first accrued and not from the alleged date when the cause of action was discovered. This was the appellant's appeal against that decision. The sole issue for consideration in this appeal was whether the trial judge had erred when he found that the cause of action had been brought after the expiration of the six years from the date on which the cause of action in contract or on
C tort accrued.

Held, dismissing the appeal with costs:

(1) Under s 29 of the Act the limitation period may be postponed if the cause of action was based on fraud of the defendant or was concealed
D by the defendant or was an action for relief from the consequences of a mistake. However, s 29 of the Act is not applicable to the appellant in this case because this issue was never pleaded nor raised by it and the parties must be bound by their pleadings (see para 16).

E (2) In Malaysia, the only test to ascertain limitation is housed in s 6 of the Act which provides that limitation runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage (see paras 28 & 29).

F (3) A cause of action on a contract accrued on the date of the breach. Based on the appellant's pleaded case it was the duty of the respondents as solicitors for the appellant to ensure that the loan facility granted to the borrower was secured through a valid and effective third party assignment over Lot 465. Since that assignment was allegedly a void instrument, the breach of duty would have occurred when it was
G executed on 6 April 1999. That being the case the appellant's claim against the respondents was time barred (see paras 30, 32–33).

(4) A cause of action in tort accrued when the appellant suffered damage. Applying the salient authorities to the instant appeal it was clear that on
H the facts as pleaded the appellant would have suffered damage when the third party assignment was executed because the appellant would have on that date been encumbered with the liability of dispensing the loan to the borrower in exchange for an invalid third party assignment, that is, time started to move as from 6 April 1999 (see paras 34 & 39).

I

[Bahasa Malaysia summary

Perayu memberikan kemudahan pinjaman sejumlah RM800,000 kepada MYT Builders Sdn Bhd ('peminjam'). Pinjaman tersebut dijamin dengan penyerahan hak pihak ketiga ke atas sebidang tanah dikenali sebagai Lot 465

di Perak ('Lot 465'). Lot 465 merupakan sebahagian daripada tanah yang dipegang di bawah Lot No 57436 dan didaftarkan di atas nama Majlis Bandaraya Ipoh ('MBI'). Menerusi kuasa wakil, MBI telah memberi kuasa kepada pemaju untuk menandatangani kontrak-kontrak jualan bagi tanah yang dipegang di bawah Lot No 57436 dan pemaju tersebut telah menandatangani perjanjian jual beli dengan penyerah hak untuk menjual Lot 465 sahaja. Responden-responden, yang pada setiap masa material merupakan peguam-peguam yang beramal di firma guaman Tetuan Aziz Hassan & Co, diarahkan oleh responden-responden untuk menyediakan dan menguruskan pelaksanaan perjanjian pinjaman tersebut oleh peminjam, bertarikh 6 April 1999; dan pelaksanaan penyerahan hak pihak ketiga tanah tersebut oleh penyerah hak; yang juga bertarikh 6 April 1999. Perayu kemudiannya memberikan pinjaman sejumlah RM800,000 kepada peminjam. Dalam bulan November 2000, peminjam gagal membayar balik pinjaman tersebut kepada perayu. Perayu kemudiannya memohon untuk melaksanakan penyerahan hak pihak ketiga terhadap Lot 465 menerusi lelongan tertutup, dan untuk tujuan itu, meminta persetujuan MBI bagi jualan tersebut. Apabila MBI tidak bersetuju, perayu memulakan tindakan terhadap MBI untuk membuatnya bersetuju bagi penjualan Lot 465. Perayu kemudiannya memutuskan untuk menarik balik prosiding terhadap MBI kerana perayu berpendapat bahawa MBI tidak mempunyai milikan ke atas Lot 465. Perayu kemudiannya memulakan tindakan terhadap responden-responden atas dasar-dasar bahawa responden-responden telah memungkiri kontrak atau cuai kerana gagal menasihati perayu bahawa penyerah hak tidak mempunyai milikan terhadap Lot 465. Hakim Mahkamah Tinggi menolak tuntutan-tuntutan perayu yang berdasarkan kepada kontrak dan tort dalam isu awalan had masa. Hakim bicara memutuskan bahawa tuntutan perayu adalah di luar had masa di bawah s 6 Akta Had Masa 1953 ('Akta'), dan bahawa had masa untuk kontrak dan tort bermula dari tarikh kausa tindakan yang didakwa mula terakru dan bukannya dari tarikh apabila kausa tindakan yang didakwa itu ditemui. Ini merupakan rayuan perayu terhadap keputusan tersebut. Satu-satunya isu untuk dipertimbangkan dalam rayuan ini adalah sama ada hakim bicara telah khilaf apabila beliau mendapati bahawa kausa tindakan telah dibawa selepas tamatnya tempoh enam tahun dari tarikh yang mana kausa tindakan dalam kontrak atau tort terakru.

Diputuskan, menolak rayuan dengan kos:

(1) Di bawah s 29 Akta tempoh had masa boleh ditangguhkan jika kausa tindakan adalah berdasarkan fraud di pihak defendan atau disembunyikan oleh defendan atau tindakan merupakan tindakan untuk relief akibat daripada kesilapan. Walau bagaimanapun, s 29 Akta tidak terpakai kepada perayu dalam kes ini disebabkan isu ini tidak

pernah diplidkan atau dibangkitkan oleh perayu dan pihak-pihak mestilah terikat dengan pliding mereka (lihat perenggan 16).

(2) Di Malaysia, satu-satunya ujian untuk menentukan had masa terdapat dalam s 6 Akta yang memperuntukkan bahawa had masa bermula dari tarikh kausa tindakan terakru tanpa mengira sama ada plaintif maklum tentang ganti rugi itu (lihat perenggan 28 & 29).

(3) Kausa tindakan bagi kontrak bermula dari tarikh kemungkiran. Berdasarkan kes yang diplidkan perayu, adalah menjadi kewajipan responden-responden sebagai peguamcara-peguamcara perayu untuk memastikan bahawa kemudahan pinjaman yang diberikan kepada peminjam dijamin dengan penyerahan hak pihak ketiga ke atas Lot 465. Disebabkan penyerahan hak tersebut didakwa sebagai instrumen yang tak sah, kemungkiran kewajipan tersebut berlaku apabila penyerahan hak tersebut dilaksanakan pada 6 April 1999. Oleh itu, tuntutan perayu terhadap responden-responden dihalang oleh had masa (lihat perenggan 30, 32–33).

(4) Suatu kausa tindakan dalam tort bermula apabila perayu mengalami kerugian. Menggunapakai autoriti-autoriti penting dalam rayuan ini, adalah jelas bahawa daripada fakta-fakta yang diplidkan, perayu akan mengalami kerugian apabila penyerahan hak pihak ketiga dilaksanakan disebabkan perayu akan, pada tarikh tersebut, dibebankan dengan liabiliti untuk memberikan pinjaman tersebut kepada peminjam dengan pertukaran satu penyerahan hak pihak ketiga yang tak sah, maka, pengiraan masa bermula dari 6 April 1999 (lihat perenggan 34 & 39).]

Notes

For a case on defendant raising defence of time bar against plaintiff's claim, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) para 4640.

For cases on parties bound by pleadings, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5492–5495.

Cases referred to

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)

Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (refd)

Baker v Ollard & Bentley (a firm) & Anor (1982) 162 Sol Jo 593, CA (folld)

Cartledge (Widow and Administratrix of the Estate of Fred Hector Cartledge (deceased)) and others v E Jopling & Sons, Ltd [1963] 1 All ER 341, HL (refd)

Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409, SC (folld)

DW Moore and Co Ltd and others v Ferrier and others [1988] 1 WLR 267, CA (folld)

Forster v Outred & Co [1982] 1 WLR 86, CA (folld)
Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)
Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid [1998] 1 MLJ 615, HC (refd)
KEP Mohamed Ali v KEP Mohamed Ismail [1981] 2 MLJ 10, FC (refd)
Koh Siak Poo v Sayang Plantation Bhd [2002] 1 MLJ 65, CA (refd)
Lever Brothers, Limited, and others v Bell and another [1931] 1 KB 557 (refd)
Lim Tiong Huai v Wang Swee Teck (trading as Wang Plumbering & Electric Co) [2004] 1 MLJ 638, HC (refd)
Melton v Walker and Stanger (1981) 125 Sol Jo 861 (folld)
Morello Sdn Bhd v Jacques (International) Sdn Bhd [1995] 1 MLJ 577, FC (refd)
Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416, SC (refd)
Narayanan v Kannamah [1993] 3 MLJ 730, HC (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm) [1983] 1 All ER 65, HL (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600, CA (refd)
Rosita bte Baharom (an infant) v Sabedin bin Salleh [1993] 1 MLJ 393, SC (refd)
S Manickam & Ors v Ismail bin Mohamad & Ors [1997] 2 MLJ 90, HC (refd)
Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633, HC (refd)
Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan [1987] 1 MLJ 393, SC (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Latent Damage Act 1986 [UK] s 14A
Limitation Act 1939 [UK] s 2(1)(a)
Limitation Act 1953 ss 6(1)(a), 29
Limitation Act 1980 [UK] ss 11, 14A, 14A(5)

Appeal from: Civil Suit No S3–22–226 of 2006 (High Court, Kuala Lumpur)

Harpal Singh (Renu Zechariah and Cheryl Kwan with him) (Rosley Zechariah) for the appellant.
Robert Lazar (Lai Wai Fong with him) (Shearn Delamore) for the respondents.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The learned High Court judge struck out the appellant's claims founded in contract and in tort on a preliminary issue of limitation. He also held that the appellant's claims were time barred by reason that the limitation period prescribed under s 6(1)(a) of the Limitation Act 1953 runs from the date the alleged causes of action first accrued and he rejected the appellant's contention that the limitation period only runs from the date the appellant discovered the alleged causes of action in April 2004.

THE FACTS OF THE CASE

[2] The respondents, all lawyers practising with a law firm known as Messrs Aziz Hassan & Co, acted for the appellant in respect of the preparation of the loan documentation for a loan facility to be granted by the appellant for the loan sum of RM800,000 to a borrower company by the name of MYT Builders Sdn Bhd ('the borrower'). The loan taken by the borrower was to be secured by a third party assignment, which was to be executed by the third party assignor, a company known as Faeiz Corporation Sdn Bhd ('the assignor'), over a piece of land known as Lot 465, Mukim Hulu Kinta, Perak ('Lot 465').

[3] Now, Lot 465 was one of the sub-divisional portions of another piece of land held under Lot No 57436, Mukim Hulu Kinta, Perak ('the master title').

[4] That master title was registered in the name of Majlis Bandaraya Ipoh ('MBI'). And by a joint venture agreement dated 20 July 1989, MBI granted to a company known as Kumpulan Promista Sdn Bhd ('the developer'), the right to develop the land held under the master title. By way of a power of attorney dated 20 July 1989 executed in favour of the developer, MBI authorised the developer to enter into contracts of sale in respect of the land held under the master title with any person of the developer's choice.

[5] And pursuant to the power of attorney, the developer as the attorney for MBI subsequently entered into a sale and purchase agreement dated 9 December 1993 with the assignor to sell Lot 465 only.

[6] In accordance to the appellant's instruction to the respondents, the respondents dutifully prepared and attended to the execution of the loan

agreement dated 6 April 1999 by the borrower and the third party assignment dated 6 April 1999 in respect of Lot 465 by the assignor respectively.

[7] Without further ado, on 6 April 1999, the appellant released the loan sum of RM800,000 to the borrower.

[8] Unfortunately, sometime in November 2000, the borrower defaulted on the repayment of the loan to the appellant.

[9] So, in April 2004, the appellant sought to enforce the third party assignment over Lot 465 by way of a private auction and, for that purpose, the appellant sought the consent of MBI for the sale and assignment of Lot 465. When MBI refused to agree, the appellant commenced an action against MBI vide Ipoh High Court Originating Summons No MTI-24–365 of 2005 for the purpose of compelling MBI to consent to the sale and assignment of Lot 465. On second thoughts, the appellant by consent withdrew the proceedings against MBI because the appellant held onto the view that the appellant did not have a good title to Lot 465.

[10] The appellant then turned the table against the respondents and sued the respondents. By way of the instant suit on 17 March 2006, the appellant commenced proceedings against the respondents alleging that the respondents had acted in breach of contract or were negligent in failing to advise the appellant that the assignor did not have a good title to Lot 465 and, that being the case, the third party assignment over Lot 465 in favour of the appellant is said to be invalid.

THE LIMITATION ISSUE BEFORE THE HIGH COURT

[11] The learned High Court judge had to consider the preliminary issue surrounding the question of limitation. And the preliminary issue centres on the question of, 'When the appellant's alleged causes of action in contract and in tort first accrued against the respondents under s 6(1)(a) of the Limitation Act 1953' that section reads as follows:

> 6
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) actions founded on a contract or on tort;

[12] It has been submitted that in determining as to when the alleged causes of action in contract and in tort first accrued against the respondents,

the date as to when the appellant discovered the alleged causes of action is totally irrelevant. The date of discovery of the alleged cause of action is only relevant under s 29 of the Limitation Act 1953 if the cause of action was based on fraud or mistake or is concealed by fraud. Here, no such plea or averment was made by the appellant. For ease of convenience, we will now reproduce s 29 of the Limitation Act 1953:

> 29 Where, in the case of any action for which a period of limitation is prescribed by this Act, either —
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

[13] In so far as s 6(1)(a) of the Limitation Act 1953 is concerned, we are of the view that an alleged cause of action in contract first accrued from the date of the first clear and unequivocal breach of contract, while an alleged cause of action based in tort first accrued when the plaintiff suffers damage.

[14] The appellant contended before the learned High Court judge that limitation period runs from the date on which the appellant discovered the alleged causes of action in contract and in tort. However, the learned High Court judge held that the alleged causes of action first accrued on 6 April 1999 when the assignor executed the third party assignment over Lot 465 in favour of the appellant and the appellant were thus time barred under s 6(1)(a) of the Limitation Act 1953.

[15] For the following reasons, we would dismiss the appeal forthwith:

THE APPELLANT'S KNOWLEDGE OF THE ALLEGED CAUSES OF ACTION IS IRRELEVANT

[16] We have read s 29 of the Limitation Act 1953 and we say that this is the only provision which allows a plaintiff to postpone the limitation period on the grounds that the facts are not known to the plaintiff. We say that the limitation period may be postposed only if the cause of action is based on fraud of the defendant or is concealed by the defendant or is an action for relief from consequences of a mistake. We categorically say that s 29 of the Limitation Act 1953 is not applicable to the appellant for the simple reason

that this issue was never pleaded nor raised. The parties must be bound by their pleadings (*Koh Siak Poo v Sayang Plantation Bhd* [2002] 1 MLJ 65, *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; *Lever Brothers, Limited, and others v Bell and another* [1931] 1 KB 557; *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615; *S Manickam & Ors v Ismail bin Mohamad & Ors* [1997] 2 MLJ 90; *Narayanan v Kannamah* [1993] 3 MLJ 730; *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 (FC); *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416; *Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan* [1987] 1 MLJ 393; *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302; *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633; *Rosita bte Baharom (an infant) v Sabedin bin Salleh* [1993] 1 MLJ 393; *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 (FC); *Morello Sdn Bhd v Jacques (International) Sdn Bhd* [1995] 1 MLJ 577 (FC); and *Lim Tiong Huai v Wang Swee Teck (trading as Wang Plumbering & Electric Co)* [2004] 1 MLJ 638). Pleadings operate to define and delimit with clarity and precision the real matters in controversy between the parties so that their respective cases can be prepared with ease and the court too can expeditiously adjudicate them. No litigant should be taken by surprise or be led astray due to faulty pleading.

[17] *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 (SC), is a judgment of Hashim Yeop A Sani CJ (Malaya) and we are bound by it. In that case, this was what His Lordship said in regard to the cause of action (see p 411 of the report):

> From established authorities we can now accept that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

[18] Continuing at p 412 of the report, His Lordship Hashim Yeop A Sani CJ (Malaya) had this to say:

> A perusal of the appeal record here shows that there is a reference to s 29 in the submission of counsel for the respondent appearing in the notes of proceedings but this section is not however referred to in the grounds of judgment. The line of argument before the learned judge was probably that the respondent's mistake was caused by the negative response from the RIMV. But s 29 of the Limitation Act 1953 cannot apply to this case for the following reasons.
>
> Section 29 of our Limitation Act 1953 is in pari materia with s 26 of the old English Limitation Act 1939 and the relevant part reads as follows:
>
> 29 Where, in the case of any action for which a period of limitation is prescribed by this Act, either —

A (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

B (c) the action is for belief from the consequence of a mistake.

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

C This provision was inserted to protect a plaintiff who was ignorant of his right of action in the special case of fraudulent concealment, and to overcome the difficulty that time would otherwise be running against him, unknown to him. As a general rule as stated in the notes in *24 Halsbury's Statutes of England and Wales* (4th Ed) to s 32 of the English Limitation Act 1980 (which is in pari materia with s 26 of the English Limitation Act 1939 which D is in turn in pari materia with s 29 of our Limitation Act 1953) it is stated that s 29(1)(c) applied 'to an action at common law to recover money paid under a mistake of fact or to an analogous claim in equity for money paid under a mistake of fact or law'.

The provision of s 29(c) of our Limitation Act 1953 is therefore only E applicable where the mistake is an essential ingredient of the cause of action.

[19] And at pp 413–414, His Lordship said:

F As stated earlier a cause of action is said to have accrued when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. In the present case on 18 June 1979 there was undoubtedly in existence someone who can sue, that is, the respondent. There was also undoubtedly some person in existence who can be sued, amongst them the appellant. On the same date there was also in G existence the facts to be proved by the respondent to entitle the plaintiff to succeed in the action.

The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general H should not be left too long in a state of uncertainty or doubt or suspense.

The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of I the limitation law should be appreciated and enforced by the courts.

[20] At this juncture, it is ideal to see how s 2(1)(a) of the UK Limitation Act 1939 is worded. We will now reproduce that section verbatim:

2(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:

(a) actions founded on simple contract or on tort;

[21] It is certainly similar to our s 6(1)(a) of the Limitation Act 1953. Now, s 2(1)(a) of the UK Limitation Act 1939, as reproduced above, merely provides that actions founded on simple contract or tort shall not be brought after the expiration of six years 'from the date on which the cause of action accrued'. The English cases have interpreted this to mean that time began to run whether or not damage was discovered.

[22] Since the damage is not apparent at the time the cause of action accrues, the result would certainly be harsh. This is best illustrated by the House of Lords case of *Cartledge (Widow and Administratrix of the Estate of Fred Hector Cartledge (deceased)) and others v E Jopling & Sons, Ltd* [1963] 1 All ER 341. In *Cartledge*, there were seven claims brought by steel dressers formerly employed by the defendant. The plaintiffs alleged that in the course of their employment, they were wrongly exposed to dust for periods from 1939 to 1950 and this exposure caused them to contract pneumoconiosis, a disease which slowly accrued and progressively damaged their lungs without their knowledge. According to the evidence that was led, a man susceptible to pneumoconiosis who inhaled noxious dust over a period of years would have suffered substantial injury before the injury can be discovered. The House of Lords held that the cause of action was time barred because on the true construction of s 2(1)(a) of the UK Limitation Act 1939, time did not run from the date when the plaintiffs knew or ought to have known that they were suffering from pneumoconiosis, but from the date when the cause of action accrued. On the facts of the case, the cause of action accrued before October 1950 when the plaintiffs suffered damage as a result of inhaling the dust although they were ignorant of the damage. The House of Lords in their judgment recognised the harshness of s 2(1)(a) of the UK Limitation Act 1939 when Lord Reid held at p 343 of the report that:

It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer; and that further injury arising from the same act at a later date does not give rise to a further cause of action. It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and therefore before it is possible to raise any action. If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never

to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided.

But the present question depends on statute, the Limitation Act 1939, and s 26 of that Act appears to me to make it impossible to reach the result which I have indicated. That section makes special provisions where fraud or mistake is involved: it provides that time shall not begin to run until the fraud has been or could with reasonable diligence have been discovered. Fraud here has been given a wide interpretation but obviously it could not be extended to cover this case. The necessary implication from that section is that, where fraud or mistake is not involved, time begins to run whether or not the damage could be discovered. So the mischief in the present case can only be prevented by further legislation.

[23] Briefly, *Cartledge* lays down the principle that limitation period runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage.

[24] And as a result of the harshness of the decision in *Cartledge*, the Committee on the Limitations of Actions in Cases of Personal Injury 1962 was set up to look into the matter. And based on the recommendation of the said committee, the UK Limitation Act 1939 was reviewed on several occasions culminating in the passing of the UK Limitation Act 1980. Section 11 of the UK Limitation Act 1980 provides for a special time limit of three years in personal injury cases. Under this provision, the time period runs from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured. This new provision overcomes the harshness of *Cartledge* in the context of personal injury cases. For ease of reference, we will now produce s 11 of the UK Limitation Act 1980:

11 Special time limit for actions in respect of personal injuries

(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(1A)[This section does not apply to any action brought for damages under section 3 of the Protection from Harassment Act 1997.]

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.

(4) Except where subsection (5) below applies, the period applicable is three years from — A

(a) the date on which the cause of action accrued; or

(b) the date of knowledge (if later) of the person injured.

B

(5) If the person injured dies before the expiration of the period mentioned in subsection (4) above, the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 shall be three years from —

C

(a) the date of death; or

(b) the date of the personal representative's knowledge; whichever is the later.

(6) For the purposes of this section 'personal representative' includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate) but not anyone appointed only as a special personal representative in relation to settled land; and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

D

(7) If there is more than one personal representative, and their dates of knowledge are different, subsection (5)(b) above shall be read as referring to the earliest of those dates.

E

[25] But, s 11 of the UK Limitation Act 1980 does not apply to negligent acts resulting in damage to property and because of this the plaintiffs in *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 1 All ER 65 (HL), were barred by limitation from pursuing their claim. The plaintiffs in *Pirelli* were suing for damages arising from cracks to their chimney, which was caused by negligent design or construction. The plaintiffs only discovered the cracks after the action was time barred. The House of Lords held that the action was time barred. Lord Fraser of Tullybelton said at p 72 of the report:

F

G

> I am respectfully in agreement with Lord Reid's view expressed in *Cartledge v Jopling* that such a result appears to be unreasonable and contrary to principle, but I think the law is now so firmly established that only Parliament can alter it.

H

[26] Continuing further down at the same page, Lord Fraser of Tullybelton aptly said:

> I express the hope that Parliament will soon take action to remedy the unsatisfactory state of the law on this subject.

I

[27] The English Parliament took heed and changed the law after the decision in *Pirelli*. And the UK Latent Damage Act 1986 was enacted to

remedy the harshness. Now, the UK Latent Damage Act 1986 added a new s 14A to the UK Limitation Act 1980 and that section reads as follows:

> 14A Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual
>
> (1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.
>
> (2) Section 2 of this Act shall not apply to an action to which this section applies.
>
> (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.
>
> (4) That period is either —
>
> (a) six years from the date on which the cause of action accrued; or
>
> (b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.
>
> (5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.
>
> (6) In subsection (5) above 'the knowledge required for bringing an action for damages in respect of the relevant damage' means knowledge both —
>
> (a) of the material facts about the damage in respect of which damages are claimed; and
>
> (b) of the other facts relevant to the current action mentioned in subsection (8) below.
>
> (7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
>
> (8) The other facts referred to in subsection (6)(b) above are —
>
> (a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
>
> (b) the identity of the defendant; and
>
> (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire —

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

[28] Limitation, under s 14A of the UK Limitation Act 1980, only begins to run either six years from the date on which the cause of action accrues or three years from the '*starting date*', if the three years period expires later. '*Starting date*' is defined in s 14A(5) of the UK Limitation Act 1980 to mean the '*earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action*'. It is now crystal clear that s 14A(5) of the UK Limitation Act 1980 caters for negligent actions where the facts relevant to the cause of action are not known on the date of accrual of the cause of action. Limitation only runs from the date the plaintiff has knowledge of the facts relevant to the cause of action. However, there is no similar or equivalent amendment to our Limitation Act 1953. So the position, in Malaysia, remains the same and that would be that limitation runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage.

[29] There is only one test in Malaysia in order to ascertain limitation. It is housed in s 6(1)(a) of the Limitation Act 1953.

CAUSE OF ACTION IN CONTRACT

[30] According to the Federal Court in the case of *Nasri v Mesah* [1971] 1 MLJ 32, that time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the appellant's right under the agreement. And that a cause of action on a contract accrues on the date of breach and in the case of actions founded on contract, time runs from the breach. Gill FJ delivering the judgment of the Federal Court had this to say at p 34 of the report:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* (1889) 22 QBD 128 at p 131). In *Reeves v Butcher* [1891] 2 QB 509 at p 511, Lindley LJ said:

> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* [1843] 4 QB 519, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

In *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610 at p 617, Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in *Gibbs v Guild* (1881) 8 QBD 296 at p 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo v Koklan & Ors* LR 57 IA 325). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

For the reasons I have stated, the period of limitation in the present case can be said to have begun to run only from the first clear and unequivocal threat to the plaintiff's right to a transfer of the land.

[31] In *Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid* [1998] 1 MLJ 615, the High Court in Malacca applied *Nasri v Mesah* in computing when does a cause of action in tort and contract arise.

[32] Now, based on the appellant's pleaded case, it was the duty of the respondents as solicitors for the appellant to ensure that the loan facility granted to the borrower was secured through a valid and effective third party assignment over Lot 465. That being the case, the alleged breach of contract would have occurred the moment the third party assignment became invalid or ineffective.

[33] It is our judgment that, on the facts as pleaded, the third party assignment was invalid for the simple reason that the assignor did not have a good title to Lot 465 and therefore could not have executed the third party assignment. And since the third party assignment was allegedly a void instrument, the breach of duty would have occurred the very moment when the third party assignment was executed. This would be on 6 April 1999 and it was therefore time barred. There are no two ways about it. This is our judgment and we so hold accordingly.

CAUSE OF ACTION IN TORT

[34] It is trite law that a cause of action founded in tort accrues when the appellant suffers damage (*Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid*).

[35] According to the case of *Forster v Outred & Co* [1982] 1 WLR 86 (CA), it was necessary to prove actual damage in order to constitute a cause of action in negligence and that on the pleaded facts the plaintiff had suffered actual damage through the defendant's negligence by executing a mortgage deed whereby her property was encumbered with a legal charge and she was subjected to a liability which might mature into a financial loss; and that, therefore, her cause of action accrued in February 1973 notwithstanding that she did not actually become liable for the repayment of the loan until the demand was made and, accordingly, the second writ was issued outside the six years' limitation period and the action begun by the first writ was rightly dismissed.

[36] Nourse J, in *Melton v Walker and Stanger* (1981) 125 Sol Jo 861 applied the case of *Forster v Outred & Co* and came to the same conclusion to the effect that a cause of action founded in tort accrued when the plaintiff suffered damage and that the cause of action was completed on 7 April 1967.

[37] Templeman LJ, writing for the Court of Appeal in *Baker v Ollard & Bentley (a firm) & Anor* (1982) 162 Sol Jo 593, aptly said that:

> The period of limitation under the Limitation Act 1939 begins to run when the cause of action accrues. In negligence actions damage is an essential part of the cause of action and thus the relevant period of limitation, in this case six years, runs from the date of the damage and not from the date of the act which causes the damage.

[38] The next case would be the case of *DW Moore and Co Ltd and others v Ferrier and others* [1988] 1 WLR 267, a decision of the Court of Appeal. Suffice for this exercise that we need only refer to the headnotes of the case at p 267 thereof:

> In March 1971 *F* approached the plaintiffs to join their business of insurance brokers. The plaintiffs agreed to take him as a shareholder and director of the first plaintiff, a company of which the second and third plaintiffs were directors. Clause 5 of the written agreement dated 1 July 1971, prepared by the defendant solicitors and made between the second and third plaintiffs and *F*, provided that if any of them ceased:
>
> > to be a member of the company such person shall not engage in any other business connected with insurance or insurance broking in any way whatever within a radius of 15 miles of King's Lynn for a period of three years from the date of such person ceasing to be a member of the company ....

The plaintiffs asserted that they were advised that that covenant was valid and binding and was sufficient in law to prevent *F* from engaging into business as specified. In May 1975, by a further agreement, the second and third plaintiffs and

F agreed to increase *F*'s shareholding. That agreement also contained, on the solicitors' advice, a restrictive clause in terms similar to cl 5 of the 1971 agreement. In December 1980 *F* decided to leave the business and to establish an insurance brokerage at Swaffham, less than 15 miles from King's Lynn. He also wanted to canvass and accept as clients the plaintiffs' clients. The then plaintiffs discovered that the covenant was ineffectual to prevent *F* from establishing his own business. On 16 April 1985 they issued a writ seeking damages for negligence. By consent the question whether s 2 of the Limitation Act 1980 afforded a defence was tried as a preliminary issue. The deputy judge held that the plaintiffs' action was statute barred.

On appeal by the plaintiffs:

Held, dismissing the appeals, that there was no presumption that on a solicitor's negligent advice damage occurred when the advice was acted on; that it was a question of fact in each case, whether actual damage had been established and when; and that, accordingly, since the plaintiffs' damage occurred at the time of executing the agreements, when they received a worthless covenant rather than a valuable chose in action, their cause of action arose more than six years before the issue of the writ and was statute barred.

[39] Applying all these salient authorities to the appeal at hand, it is our judgment that on the facts as pleaded the appellant would have suffered damage when the third party assignment was executed because the appellant would have, on that date, been encumbered with the liability of dispensing the loan to the borrower in exchange for an invalid third party assignment. It is also our judgment, on the available evidence, that the appellant's loss would have crystallised the moment the loan sum was disbursed to the borrower in early April 1999 in exchange for an invalid third party assignment. Time started to move from 6 April 1999.

[40] For the reasons adumbrated above, we unanimously dismissed the appeal with costs. And we fixed costs as agreed at RM5,000. The deposit should rightly go to the respondents as part of the agreed costs.

Appeal dismissed with costs.

Reported by Kohila Nesan